STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

PATRICIA PAQUETTE, Guardian and Conservator of RICHARD PAQUETTE, a Legally Incapacitated Individual,

Plaintiff,

vs. Case No. 2004-2787-NO

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant.
_____/

OPINION AND ORDER

Defendant State Farm Mutual Automobile Insurance Company ("Defendant") has filed a motion for summary disposition as to non-contractual claims and for an order concerning the applicability of MCL 500.3145(1) pursuant to MCR 2.116(C)(8). Plaintiff requests the Court deny Defendant's motion.

Patricia Paquette is the mother and acting legal guardian and conservator of Richard Paquette, who was severely injured in an automobile accident on March 16, 1985 when he was 19 years old. As a result of the accident, Robert has remained in a semi-comatose and severely brain-injured state and has required 24-hour attendant care. Robert was covered under an automobile insurance policy issued by State Farm.

Plaintiff filed the complaint on July 1, 2004, seeking payment of personal injury protection benefits that State Farm allegedly failed to pay. On July 20, 2004, Plaintiff filed an amended complaint. Plaintiff's amended complaint alleges a violation of the Uniform Trade Practices Act in count 1; bad faith, breach of implied covenant of good faith fair dealing, and bad

faith denial of the existence of a contract, and fraud/misrepresentation in count 2; failure to investigate claim and act in good faith, and misrepresentation in count 3; and fraud, misrepresentation, and silent fraud of Defendant State Farm, Arvilla Woods, Shanne Smith, Marissa Gibbons, and unnamed supervisors in count 4. On March 13, 2006, Plaintiff filed a first amended complaint that removed the individual defendants, and added a claim for violation of the Michigan Consumer Protection Act (MCPA) against Defendant.

On March 28, 2005, Plaintiff filed a motion for partial summary disposition. On April 11, 2005, Defendant filed a response seeking denial of Plaintiff's motion, and in addition, filed a cross motion for summary disposition pursuant to MCR 2.116(I)(2). On June 24, 2005, the Court entered an *Opinion and Order* granting Plaintiff's motion for partial summary disposition as to Defendant's affirmative defense of the one-year back rule.[1]

After the Court's June 24, 2005 *Opinion and Order*, the Michigan Supreme Court decided *Devillers v Auto Club Insurance Association*, 473 Mich 562; 702 NW2d 539 (2005). *Devillers* was entered on July 29, 2005, and stated that "this case is to be given retroactive effect as usual and is applicable to all pending cases in which a challenge to *Lewis*'s judicial tolling approach has been raised and preserved." at 587. On April 4, 2006, Defendant filed the instant motion. Defendant contends that summary disposition is appropriate pursuant to MCR 2.116(C)(8), based upon *Devillers* and the one-year back rule of MCL 500.3145(1). Defendant also contends that Plaintiff's remaining claims fail to state a claim upon which relief can be granted, as the No Fault Act provides the exclusive remedies for any breach of a no-fault insurance contract.

[1] The Court's June 24, 2005 *Opinion and Order* also denied the individual defendants' motion for summary disposition. The individual defendants are no longer named as party defendants.

Plaintiff contends that Defendant's motion for summary disposition should be denied as untimely. Plaintiff also contends that Defendant's motion should be denied, since the one-year back rule does not preclude claims that involve allegations of fraud.

The Court will first address Plaintiff's contention that Defendant's motion for summary disposition should be barred as being untimely. Under MCR 2.401(B)(1)(b), the trial judge may "enter a scheduling order setting time limitations for the processing of the case and establishing dates when future actions should begin or be completed in the case." The enforcement of a scheduling order has recently been upheld by the Michigan Supreme Court in *Edi Holdings LLC v Lear Corp*, 469 Mich 1021; 678 NW2d 440 (Table)(2004), and in *People v Grove*, 455 Mich 439, 469; 566 NW2d 547 (1997).

In the case at hand, a discovery and case evaluation order was entered on September 21, 2004, and provided "[s]ummary disposition motion(s) must be filed and heard by 90 days after the discovery cut off date in paragraph 2 of this Order." Discovery closed on this matter on June 20, 2005. Although defendant's motion for summary disposition is allegedly untimely, since the parties stipulated to an order extending discovery for 90 days, the Court will allow delayed motions, including motions for summary disposition. Therefore, the Court will render the following decision on the merits.

The Court will now address Defendant's arguments for summary disposition. Summary disposition may be granted pursuant to MCR 2.116(C)(8) on the ground that the opposing party "has failed to state a claim on which relief can be granted." *Radtke v Everett*, 442 Mich 368, 373; 501 NW2d 155 (1993). All factual allegations are accepted as true, as well as any reasonable inferences or conclusions that can be drawn from the facts. *Id.* The motion should be granted only when the claim is so clearly unenforceable as a matter of law that no factual

development could possibly justify a right of recovery. *Wade v Dep't of Corrections*, 439 Mich 158, 163; 483 NW2d 26 (1992); *Cork v Applebee's Inc*, 239 Mich App 311, 315-316; 608 NW2d 62 (2000).

Defendant's first argument is that Plaintiff's claims are limited by the one-year back rule of MCL 500.3145 and *Devillers*. In *Devillers*, the Michigan Supreme Court overruled *Lewis v DAIIE*, 426 Mich 93; 393 NW2d 167 (1986), and its progeny that allowed judicial tolling of the one-year-back provision of MCL 500.3145(1). The Court also ordered the decision in *Devillers* to be given retroactive effect.

The factual scenario in the case at hand is similar to the question presented in *Gulley v Automobile Club Insurance Association*, unpublished opinion per curiam of the Court of Appeals, issued April 25, 2006 (Docket No. 259012). In *Gulley*, the Court of Appeals held that the insanity savings provision provided in the Revised Judicature Act (RJA), MCL 600.5851(1), tolled the plaintiff's personal protection insurance (PIP) benefits that accrued prior to October 1, 1993. The Court in *Gulley* found the plaintiff was not entitled to the insanity saving provision provided for in MCL 600.5851(1) for expenses incurred between October 1, 1993, and one year prior to the filing of the lawsuit, in accordance with the one-year-back provision of MCL 500.3145(1). The Court finds the reasoning in *Gulley* to be persuasive.

However, Plaintiff has alleged claims of fraud and equitable estoppel. In *Devillers*, the Court specifically mentioned the Court's *equitable* powers in "unusual circumstances" such as fraud or mutual mistake. *Devillers*, at 590. The Court stated, "[t]here has been no allegation of fraud, mutual mistake, or any other 'unusual circumstance' in the present case. Accordingly, there is no basis to invoke the Court's equitable power." *Id.*, at 591. In the case at hand, Plaintiff has alleged fraud, silent fraud, equitable estoppel and fraudulent concealment. All of

these allegations are sufficient to allow the Court to use *equitable* powers to toll the one-year-back provision of MCL 500.3145(1). See *Devillers; Secura Ins Co v Auto-Owners Ins Co*, 232 Mich App 656, 661; 591 NW2d 420 (1998); *Adams v Detroit*, 232 Mich App 701; 591 NW2d 67 (1998). Consequently, Defendant's motion for summary disposition based upon the one-year-back rule should be denied.

The Court will next address Defendant's argument that the No Fault Act, MCL 500.3101 *et seq.* provides the exclusive remedies for any breach of a no-fault insurance contract. In support of this argument, Plaintiff refers the Court to *Cruz v State Farm Mutual Auto Ins Co*, 241 Mich App 159; 614 NW2d 689 (2000), 466 Mich 588; 648 NW2d 591 (2002). The Court is satisfied that *Cruz* does not stand for this blanket proposition. Consequently, Defendant's motion for summary disposition based this argument should be denied.

The Court will next address Defendant's argument that Plaintiff's claim based upon the Uniform Trade Practices Act (UTPA) should be dismissed since it does not provide for a private cause of action. Plaintiff has agreed that the UTPA does not provide for a private cause of action. Consequently, it appears to the Court that this argument is conceded.

The Court will next address Defendant's argument that Plaintiff's claim for breach of implied covenant of good faith and fair dealing should be dismissed since it is not recognized in Michigan. Michigan does not recognize a *non-contractual* claim for breach of an implied covenant of good faith and fair dealing. *Belle Isle Grill Corp v City of Detroit*, 256 Mich App 463, 476; 666 NW2d 271 (2003). Consequently, Defendant's motion for summary disposition of Plaintiff's claim for a *non-contractual* breach of covenant of good faith and fair dealing should be granted.

The Court will next address Defendant's argument that Plaintiff's claim for intentional infliction of emotional distress should be dismissed on the basis that the failure to pay a contractual obligation does not amount to outrageous conduct. Defendant relies upon *Hayley v Allstate Ins Co*, 262 Mich App 571; 686 NW2d 273 (2004) for this proposition. To establish a claim of intentional infliction of emotional distress, a plaintiff must prove the following elements: "(1) extreme and outrageous conduct, (2) intent or recklessness, (3) causation, and (4) severe emotional distress." *Id.* The conduct complained of must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community." *Id.* It is for the trial court to initially determine whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery. *Id.* But where reasonable individuals may differ, it is for the jury to determine if the conduct was so extreme and outrageous as to permit recovery. *Id.* The Court is satisfied that a reasonable person would not find Defendant's alleged conduct to be so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency. Consequently, Defendant's motion for summary disposition of Plaintiff's claim for intentional infliction of emotional distress should be granted.

The Court will next address Defendant's argument that Plaintiff's claim for silent fraud cannot stand absent a duty to disclose. To establish a cause of action predicated on fraud, a plaintiff must prove: (1) that the defendant made a material representation; (2) the representation was false; (3) when the defendant made the representation, he or she knew it to be false, or made it recklessly; (4) the defendant made the representation with the intention that the plaintiff would act on it; (5) the plaintiff acted in reliance upon it; and (6) the plaintiff suffered damage. *M & D, Inc v. McConkey,* 231 Mich App 22, 27; 585 NW2d 33 (1998). For purposes of silent fraud, a

plaintiff must establish that a false or misleading representation was made in response to an inquiry that was incomplete, and that there was a legal or equitable duty to disclose. *Id.* at 30-31.

Plaintiff responds by contending that the UTPA, common law, and the voluntary undertaking of a duty are sufficient to establish a duty to disclose and satisfy a claim of silent fraud. The question whether a duty exists is a question of law for the court. *Simko v Blake*, 448 Mich 648, 655; 532 NW2d 842 (1995). Whether a plaintiff can use a statute to impose a duty of care on a defendant depends on (1) whether the purpose of the statute was to prevent the type of injury and harm actually suffered, and (2) whether the plaintiff was within the class of persons which the statute was designed to protect. *McKnight v Carter*, 144 Mich App 623, 636; 376 NW2d 170 (1985). The Court is satisfied that the UTPA imposes a duty upon insurers to not misrepresent insurance policy provisions. MCL 500.2026(1)(a). Consequently, Defendant's motion for summary disposition of Plaintiff's claim of silent fraud should be denied. The Court is further satisfied that Plaintiff has also set forth a claim for fraud.

The Court will next address Defendant's argument that Plaintiff may not bring a claim against an insurer for violation of the Michigan Consumer Protection Act, based upon an amendment of MCL 445.904 effective March 28, 2001. Prior to this amendment, a private cause of action for breach of MCL 445.911 existed. See *Smith v Globe Life Ins Co*, 460 Mich 446; 597 NW2d 28 (1999). The Court is satisfied that Plaintiff's claims under the MCPA are valid since the alleged misconduct occurred prior to the amendment of MCL 445.904. MCL 445.904 does not contain any language to make it retroactive. In addition, in *Grant v AAA Michigan, Wisconsin, Inc*, 474 Mich 988; 707 NW2d 592 (2005), the Michigan Supreme Court allowed a claim under the MCPA to proceed despite the claim being filed after the effective date of the amendment to MCL 445.904. The Court held:

> we VACATE the judgment of the Court of Appeals and REMAND this case to the Court of Appeals for reconsideration in light of our decision in *Smith v Globe Life Ins Co,* 460 Mich. 446, 467; 597 NW2d 28 (1999), holding that MCL 445.904(1) and (2) permit private actions against an insurer pursuant to MCL 445.911, because, prior to its amendment by 2000 PA 432, MCL 445.904(2) provided an exception to the exemption of MCL 445.904(1)(a) permitting private actions pursuant to MCL 445.911 arising out of misconduct made unlawful by chapter 20 of the insurance code.

Consequently, Defendant's motion for summary disposition of Plaintiff's claim under the MCPA should be denied.

Based upon the reasons set forth above, Defendant's motion for summary disposition is GRANTED IN PART AND DENIED IN PART. In compliance with MCR 2.602(A)(3), the Court states this Opinion and Order does not resolve the last claim and does not close the case.

IT IS SO ORDERED.

Dated: July 13, 2006

DONALD G. MILLER
Circuit Court Judge

CC: Paul A. Zebrowski
Richard H. Friedman, *pro hac*
Paul H. Johnson
James F. Hewson

DONALD G. MILLER
CIRCUIT JUDGE

JUL 13 2006

A TRUE COPY
CARMELLA SABAUGH, COUNTY CLERK
BY: _____ Court Clerk